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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

KIM SORGENTE,

Plaintiff and Appellant,

v.

CHRIS EAGEN,

Defendant and Respondent.

G056056

(Super. Ct. No. 30-2017-00954295)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Timothy J. Stafford, Judge. Dismissed in part and reversed in part.

Kim Sorgente in pro. per. for Plaintiff and Appellant.

John L. Dodd & Associates and John L. Dodd for Defendant and Respondent.

Kim Sorgente petitioned for a civil harassment restraining order (TRO) against Chris Eagen. The trial court dismissed the petition and awarded attorney fees to Eagen. Sorgente raises the following two issues on appeal: (1) the attorney fee award was fundamentally unfair because he was not given adequate notice or time to respond to the request; and (2) there was substantial evidence to justify a civil harassment TRO, especially because Eagen “discredited himself” at the hearing. Sorgente’s notice of appeal did not include the court’s ruling on his request for a TRO. Accordingly, this court lacks jurisdiction to consider the merits of this aspect of the appeal, and we must dismiss it. Sorgente’s timely appeal of the attorney fee award has merit because Eagen failed to satisfy the requirements of Code of Civil Procedure section 1033.5.¹ We reverse the attorney fee award.

FACTS

Sorgente believed he was being harassed and threatened by Eagen and members of the Proud Boys Club. On November 7, 2017, he sought a temporary restraining order and injunction under section 527.6 against Eagen. In his application, Sorgente alleged Eagen was affiliated with a gang that “put out a ‘green light’ hit on Johnny Bennitez and himself.” He said he knew Eagen from “patriotic gatherings, political events and ‘free speech’ events.” Sorgente and Bennitez organized “an event” for his group “Onward America” that Eagen and his gang members attended and “threaten[ed], harass[ed], and attempt[ed] to intimidate” Sorgente.

Sorgente explained that one evening in late August 2017, “Eagen became unexpectedly belligerent and threatening during a conversation on social media. Some friends and I had just returned from Berkeley where our presence led to national exposure of the group Antifa and now upon our return, we were strangely becoming the targets of [Eagen] and his gangs, the AKs and the Proud Boys. Eagen demanded that I meet him at

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All further statutory references are to the Code of Civil Procedure.

a school near my house and I did. He arrived . . . [and] pulled a knife.” Sorgente stated that after he saw the knife, he directed a high-powered flashlight on Eagen “to disorient him and protect myself.” Sorgente declared, “He seemed to panic and as we ran back to our vehicles, it was my belief that he retrieved a gun from his truck.” Sorgente asserted Eagen encouraged his gang to retaliate, and three people assaulted him. Sorgente sought stay away orders and that Eagen be prohibited from attending any further Onward America events.

The court scheduled an Order to Show Cause (OSC) on the matter for November 29, 2017. At the hearing, Eagen was represented by counsel and Sorgente was not. The court heard testimony from the two parties as well as three witnesses (Luke Dennis, Steve Taylor, and Jarrod Lawrence). Eagen filed a last minute brief in opposition to the TRO, arguing there was not clear and convincing evidence of unlawful harassment. On the third page of the brief, Eagen’s counsel submitted a declaration stating he charged \$360 per hour, he had spent over 10 hours preparing for the hearing, and Eagen was requesting an attorney fee award of \$3,780.

The court denied Sorgente’s request for a TRO. The minute order stated, “The oral motion for attorney fees requested by [Eagen] is granted in the sum of \$3,780.” (Capitalization omitted.)

On December 20, 2017, Eagen filed an application for a judgment debtor’s examination (JDE) and scheduled the exam for January 25, 2018. The same day he filed a memorandum of costs related to the JDE (attorney fees for two hours of work and costs related to filing the JDE application).

On January 17, 2018, before the JDE, the court filed a written order (prepared by Egan’s counsel) awarding \$3,780 in attorney fees. The order simply stated the following: “Pursuant to the oral motion for attorney fees requested by [Eagen] at the above captioned hearing and as noted by this court’s minute order of [November 29, 2017]. [¶] It is hereby ordered that . . . Eagen, shall be and is hereby granted attorney[]

fees in the sum of \$3,780.” (Capitalization omitted.) Thereafter the January 25, 2018 JDE was taken off calendar because “[n]o proof of service [was] filed.” On February 23, 2018, Sorgente filed a notice of appeal of the January 17, 2018, order awarding attorney fees.

DISCUSSION

A. *TRO Ruling*

Sorgente’s notice of appeal does not mention the November 29, 2017, minute order denying his TRO request. That order was directly appealable. (§ 904.1, subd. (a)(6).)

“‘[A]n unsigned minute order can form the basis of an appeal, unless it specifically recites that a formal order is to be prepared. . . . [Citations.]’ [Citations.]” (*Cuenllas v. VRL International, Ltd.* (2001) 92 Cal.App.4th 1050, 1053.) California Rules of Court, rule 8.104(c)(2) provides: “The entry date of an appealable order that is entered in the minutes is the date it is entered in the permanent minutes. But if the minute order directs that a written order be prepared, the entry date is the date the signed order is filed; a written order prepared under [California Rules of Court,] rule 3.1312 or similar local rule is not such an order prepared by direction of a minute order.”

Here, the court’s minute order denying the TRO did not request that counsel prepare a formal order. The record on appeal does not contain any evidence of a mailed or served notice of the denial. Assuming no notice was given of the ruling, the time for filing a notice of appeal would have been 180 days after the November 29, 2017, entry date. (Cal. Rules of Court, rule 8.104(a)(1)(C).)

Sorgente’s did not file a notice of appeal from the November 29, 2017, minute order denying his TRO request within 180 days. His February 23, 2018, notice of appeal concerns only the January 17, 2018, attorney fee order. Under these circumstances, we have no jurisdiction to consider Sorgente’s arguments in this appeal

concerning the TRO ruling, and we must dismiss this aspect of the purported appeal. (*Ramirez v. Moran* (1988) 201 Cal.App.3d 431, 437 [“The matter is jurisdictional and goes to the very power of this court to act”].)

We considered but rejected the possibility of treating Sorgente’s appeal from the court’s written January 17, 2018, attorney fee order as also being an appeal from the earlier minute order denying his TRO request. An appeal from an order granting attorney fees plainly raises issues different from those arising from the underlying claim, i.e., denial of the TRO. In addition, the attorney fee award does not mention the TRO ruling. We conclude the only issues properly before us pertain to attorney fees.

B. Attorney Fees

Sorgente asserts his due process rights were violated because he had inadequate notice Eagen planned to request attorney fees. He complains Eagen handed him a written response one hour before trial, and the request for attorney fees was not listed in the brief’s caption or first page heading. Sorgente maintains he was unaware of the attorney fee request until the end of the hearing.

The court’s minute order and the January 17, 2018, written order both state the court granted Eagen’s “oral motion” for attorney fees. The reporter’s transcript confirms Eagen’s counsel requested attorney fees during his closing statements. Thus, it appears the trial court’s attorney fee award may have been based on an oral motion rather than consideration of the last-minute response briefing. In either case, Eagen’s attorney fee requests were procedurally defective.

“A party may seek statutory attorney’s fees as costs through any of four methods: (1) on noticed motion, (2) at the time a statement of decision is rendered, (3) on application supported by affidavit made concurrently with a claim for other costs, or (4) on entry of a default judgment. [(§ 1033.5, subs. (a)(10)(B) & (c)(5).)] In practice, however, a noticed motion is generally required. [Citations.] This is because rule 3.1702 of the California Rules of Court proscribes a noticed motion procedure whenever the

court is required to determine whether the requested fee is reasonable or whether the requestor is a prevailing party. (Cal. Rules of Court, rule 3.1702; see 2 Pearl, California Attorney Fee Awards (3d ed. 2018) § 11.26, p. 11-30 [‘Unless otherwise provided by statute, a noticed motion is required to claim attorney fees.’].)” (*Hardie v. Nationstar Mortgage LLC* (2019) 32 Cal.App.5th 714, 720 (*Hardie*).)

Section 527.6, subdivision (s), provides the following: “The prevailing party in an action brought under this section may be awarded court costs and attorney’s fees, if any.” Because this statute requires the trial court to determine whether the defendant was a prevailing party, “good reason exists” for the required noticed motion. (*612 South LLC v. Laconic Limited Partnership* (2010) 184 Cal.App.4th 1270, 1284.) Section 527.6, subdivision (s), “contains no statutory exception to the noticed motion requirement.” (*Hardie, supra*, 32 Cal.App.5th at p. 720.)

In response to the TRO petition, Eagen was permitted to “file a response that explains, excuses, justifies or denies the alleged harassment, or may file a cross-petition under this section.” (§ 527.6, subd. (h).) This section does not authorize the responding party to jump the gun and present prevailing party arguments before the OSC.

We conclude the section 527.6 “response,” hand delivered to Sorgente immediately before the hearing, did not satisfy the requirement of a properly noticed motion. (*Hardie, supra*, 32 Cal.App.5th at p. 720.) Similarly, Eagen’s counsel’s request for attorney fees at the end of the hearing would not satisfy the requirements of section 1033.5 or California Rules of Court, rule, 3.1702.

Eagen also seeks attorney fees on appeal. He asserts authorization for the recovery of attorney fees at trial includes attorney fees incurred on appeal. (See *Morcos v. Board of Retirement* (1990) 51 Cal.3d 924, 927.) However, Eagen is not the prevailing party on appeal, and we have reversed the court’s ruling authorizing the recovery of attorney fees.

DISPOSITION.

We reverse the January 17, 2018, order awarding attorney fees. We deny Respondent's motion for sanctions because this was not a frivolous appeal. We dismiss from this appeal all arguments pertaining to the November 2017 TRO ruling. In the interests of justice, each side shall bear their own costs on appeal.

O'LEARY, P. J.

WE CONCUR:

ARONSON, J.

GOETHALS, J.